THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

Patricia Bedford

v.

New Hampshire Community Technical College System
and State of New Hampshire Division of Personnel

04-E-229

Anne Breen

v.

New Hampshire Community Technical College System
and State of New Hampshire Division of Personnel

04-E-230

ORDER

The petitioners in these two consolidated cases, Patricia Bedford and Anne Breen, appeal the finding of the New Hampshire Commission for Human Rights (the "Commission") of no probable cause for the petitioners' complaint of unlawful employment discrimination by the respondents, New Hampshire Community Technical College System ("NHCTCS") and the State of New Hampshire Division of Personnel ("Division"). The respondents object to the petitioners' appeal and argue that the Commission's finding should be upheld. The Court held a hearing on the issue on March 2, 2006. Upon review of the parties' arguments, the pleadings, and the applicable law, the Court **REVERSES** the finding of the Commission.

Factual Background

The petitioners are state employees who are employed at the New Hampshire Technical

Institute ("NHTI") in Concord, New Hampshire. NHTI and four other regional community technical colleges make up co-respondent NHCTCS. NHCTCS is a state agency which purpose is to provide, within its financial ability, continued higher education for youth and adults in New Hampshire. RSA 188-F:1 (Supp. 2005). Co-respondent, the Division, is also a state agency and is responsible for, among other things, overseeing the negotiation and administration of all state employee benefits programs, except for the state's retirement system. RSA 21-I:42 (Supp. 2005). The Division, through the Department of Administrative Services, is also responsible for implementing the collective bargaining agreement ("CBA"), as negotiated between the State Employees Association ("SEA") and the State. Resp. Memo. of Law in Support of Mot. to Uphold Findings of the Commission, Doc. 12, ¶ 10.

The respondents do not dispute the following facts. Petitioner Bedford has been an employee of NHTI for approximately nine years and is a department director who oversees the administration of federal grants and assists students with disabilities. Pet. Memo. of Law in Support of Mot. to Reverse Findings of the Commission, Doc. 14, ¶ 2. Petitioner Bedford is a lesbian who has been in a committed relationship with her same-sex partner for the past fourteen years and is the biological parent of a child she raises with her partner. Id. She and her partner share a common home and are financially and emotionally interdependent. Id.

Petitioner Breen has been an employee of NHTI for approximately sixteen years and is the director of security. Id. Petitioner Breen is a lesbian who has been in a committed relationship with her same-sex partner for the past twenty-six years and jointly raises the biological child of her partner. Id. She and her partner share a common home and are financially and emotionally interdependent. Id.

Both petitioners, as full-time employees, qualify to receive employee benefits, including

health and dental insurance, sick time, dependent care and bereavement leave. Resp. Memo. of Law in Support of Mot. to Uphold Findings of the Commission, Doc. 12, ¶ 4. Both petitioners seek health and dental insurance for their partners, and entitlement to paid bereavement leave should either of their partners die. Petitioner Breen also seeks dependent care leave benefits so that she may care for her partner's biological child. NHCTCS and the Division assert that the petitioners are not entitled to those benefits based on applicable state statutes, administrative rules, and the CBA.

The petitioners filed complaints with the Commission alleging that the respondents' refusal to provide them with the benefits they seek constitutes unlawful employment discrimination under RSA 354-A:7 (Supp. 2005). Because those same benefits are available to the married partners of state employees, and because state law prohibits marriage between same-sex persons, the petitioners argued that conditioning eligibility for employment benefits upon marriage unlawfully discriminates based upon sexual orientation. The Commission found no probable cause for the petitioners' complaints because: 1) "[t]he Commission lacks the authority to override the various statutes and statutory schemes set in place by the legislature," which do not extend benefits to same-sex partners; and 2) even if the Commission had such authority, there would be no probable cause to believe that the petitioners were discriminated against because of their sexual orientation. Commission Order on Compl. Req. to Reopen and for Reconsideration, Ex. C, Doc. 14. This appeal followed.

Standard of Review

RSA 354-A:21 (Supp. 2005) states in relevant part:

> When the investigating commissioner finds no probable cause to credit the allegations in [a] complaint, the complaint shall be dismissed, subject to a right of appeal in the superior court. To prevail on appeal, the moving party shall establish that the commission decision is unlawful or unreasonable by a clear

> preponderance of the evidence. The findings of the investigating commissioner upon questions of fact shall be upheld as long as the record contains credible evidence to support them.

(emphasis added).

Analysis

The Commission found that: 1) the petitioners are members of a protected class based on their sexual orientation; 2) they are eligible to receive benefits; and 3) they are not eligible to extend those benefits to their same-sex partners. The Commission also found that Petitioner Breen is not permitted to use her dependent care leave benefits to care for her partner's biological child. The petitioners claim that denial of full employment benefits violates RSA 354-A:7 (Supp. 2005). They bring no constitutional claims. This statute provides:

> It shall be an unlawful discriminatory practice:
> I. For an employer, because of the age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

(emphasis added).

In order to determine whether unlawful discrimination has occurred, the Court considers whether the policy at issue is facially discriminatory or facially neutral. In order to determine if a policy is facially discriminatory, a disparate treatment analysis is employed. If the policy is facially neutral, however, a disparate impact analysis is employed.

To determine whether the petitioners have been unlawfully discriminated against on the basis of sexual orientation under the disparate treatment analysis, the Court looks first to whether the petitioners have met their burden of establishing a prima facie case of discrimination, that is, whether they have raised an inference of discrimination. In order for the petitioners to establish a

prima facie case that the respondents' policy is discriminatory in that it permits the disparate treatment of lesbians and gay men based on their sexual orientation, they must show that: 1) they are members of a protected class; 2) they qualify for the benefits sought; 3) despite their qualifications they were denied benefits or terms and conditions of their employment; and 4) those same benefits were provided to similarly situated state employees outside of their protected class. See Madeja v. MPB Corp., 149 N.H. 371, 378 (2003) (establishing that in considering an issue of first impression under RSA chapter 354-A, "[the Court] rel[ies] upon cases developed under Title VII to aid in [its] analysis."); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the criteria by which a petitioner may make a prima facie case of discrimination in a Title VII action). If the policy is found to be discriminatory, the burden shifts to the employer to articulate some nondiscriminatory justification for the policy. If and when that burden is met, the petitioners must produce proof that the reasons are a mere pretext for discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

If the petitioners cannot establish a prima facie case under the disparate treatment analysis, the Court considers whether the petitioners have established a prima facie case under the disparate impact analysis. "It has long been understood that discrimination, whether measured quantitatively or qualitatively, is not always a function of a pernicious motive or malign intent. Discrimination may also result from otherwise neutral policies and practices that, when actuated in real-life settings, operate to the distinct disadvantage of certain classes of individuals." EEOC v. Steamship Clerks Union, Local 1066, 48 F. 3d 594, 601 (1st Cir. 1995). "[T]his understanding is reflected in the concept of disparate impact discrimination--a concept born of a perceived need to ensure that Title VII's proscriptive sweep encompasses not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Id. "In the disparate impact milieu, the prima facie case

consists of three elements: identification, impact, and causation." Id. "First, the plaintiff must identify the challenged employment practice or policy, and pinpoint the defendant's use of it. Second, the plaintiff must demonstrate a disparate impact on a group characteristic, such as race, that falls within the protective ambit. . . . Third, the plaintiff must demonstrate a causal relationship between the identified practice and the disparate impact." Id.

Once a plaintiff has established a prima facie case under the disparate impact analysis, the burden shifts to the defendant to either attack the sufficiency of the plaintiff's proof, or to acknowledge the legal sufficiency of the prima facie case but to show that the policy is "job related and consistent with business necessity, or that it fits within one or more of the explicit statutory exceptions. . . ." Id. at 602. If the defendant is successful in establishing a legitimate nondiscriminatory purpose for the policy, the burden shifts back to the plaintiff to show that the professed purpose is pretextual. Id.

Here, the petitioners brought their claims to the Commission arguing that the State's employment policy is discriminatory based on sexual orientation under both the disparate treatment and disparate impact analyses. The Commission found no probable cause for the petitioners' claims of sexual orientation discrimination under the disparate treatment analysis and declined to conduct a disparate impact analysis, stating that the policy lacked the requisite facial neutrality.

The Court first addresses the petitioners' claims under the disparate treatment analysis. In the petitioners' cases, the final reports issued by the Commission found no probable cause for their complaints. In so finding, the Commission determined that while the petitioners were members of a protected class who were eligible for, and denied, benefits, they were similarly situated to others outside their protected class who were also denied those benefits. The

Commission found that the persons with whom the petitioners are similarly situated are heterosexual, unmarried employees who are also denied the benefits at issue regardless of the level of commitment they have with their partners.

The Commission also found that the intent of the legislature in making sexual orientation a protected class, was not to provide "spousal equivalency" criteria for same-sex domestic partners, and therefore no statutory violation had occurred. The Commission further determined that the administrative rules, the relevant statutes and the CBA precluded it from ruling on the issue. Moreover, the Commission concluded that the petitioners' complaint was in fact an attempt to attack the constitutionality of the marriage laws and was therefore not properly before the Commission. Commission Finding of No Probable Cause, Ex. A, Doc. 14 (citing Ross v, Denver Dept. of Health and Hospitals, 883 P.2d 516, 520 (Co. App. Ct. 1994), for the proposition that any "concern is with the perceived unfairness of the state's marital laws . . . and the decision to change the marriage laws to permit same-sex marriages . . . is a matter for the legislature, not the courts."). See also, Commission Order on Compl. Req. to Reopen and for Reconsideration, Ex. C, Doc. 14 (determining that "despite [their] attempts to distance [themselves] from the New Hampshire Marriage Statute and the other statutes incident to [their] employment . . . the close nexus is clear.").

The petitioners claim that the Commission erred as a matter of law in finding both that they are similarly situated to unmarried heterosexuals and that their complaints were an attempt to address the constitutionality of New Hampshire's marriage laws. The petitioners also claim that neither state law, the administrative rules, nor the CBA prevent the State from providing the petitioners with equal benefits, and that the Commission has the authority to rule based on the alleged statutory violation.

RSA 354-A:7 is clear that a person shall not be discriminated against in employment compensation or terms of employment based on sexual orientation. Compensation and "terms, conditions or privileges of employment" include health insurance and other fringe benefits. See Newport News Shipbuilding and Dry Dock Company v. EEOC, 462 U.S. 669, 682 (1983) (concluding that "[h]ealth insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'" for purposes of Title VII).

As concluded by the Commission, the issue in this disparate treatment claim is whether the benefits the petitioners seek are provided to similarly situated employees outside their protected class. "A claim of disparate treatment based on comparative evidence must rest on proof that the proposed analogue is similarly situated in material respects. . . . The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. While an exact correlation is not necessary, the proponent must demonstrate that the cases are fair cogeners." Perkins v. Brigham & Women's Hospital, 78 F.3d 747, 751 (1st Cir. 1996) (internal quotations and citations omitted). "In other words, apples should be compared to apples." The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989), *rev'd on other grounds*, Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61 (2004).

"Because [New Hampshire's anti-discrimination] statute is sufficiently similar to those of many States and the federal civil rights statute, [the Court] look[s] to foreign case law for guidance" in this area. Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 587 (2003). The respondents argue that case law supports their position that a prohibition against discrimination based on sexual orientation does not mandate that an employer extend equal benefits to same-sex domestic partners that are extended to married couples. Specifically, the respondents cite to Ross v.

Denver Department of Health and Hospitals, 883 P.2d 516 (Colo. Ct. App. 1994), Hinman v. Department of Personnel Administration, 167 Cal. App. 3d 516 (1985), Phillips v. Wisconsin Personnel Board, 167 Wis. 2d 205 (1992), Rutgers Council of AAUP Chapters v. Rutgers, the State University, 298 N.J. Super. 442 (1997), and Beaty v. Truck Insurance Exchange, 6 Cal. App. 4th 1455 (1992). In all of these cases, the courts held that lesbians and gay men in committed relationships were similarly situated to unmarried heterosexuals. Thus, these courts determined that employment and/or insurance policies which conditioned benefits upon marriage were not discriminatory because unmarried heterosexuals were also prohibited from extending the benefits to their unmarried, domestic partners.

The petitioners argue that more recent case law supports their position that conditioning employment benefits upon marital status, where lesbians and gay men are not permitted to marry, constitutes unlawful discrimination based on sexual orientation. The petitioners cite to a number of cases from other jurisdictions, most notably Alaska Civil Liberties Union v. State of Alaska, 122 P.3d 781 (Alaska 2005), and Levin v. Yeshiva University, 96 N.Y. 2d 484 (2001).

In Alaska CLU, the Alaska Supreme Court considered whether the state's employment benefits program, which was extended only to spouses of employees and not to same-sex partners, violated the equal protection clause of the Alaska Constitution. Alaska CLU determined that because marriage is prohibited between same-sex individuals, use of marriage as the threshold criterion for employment benefits was facially discriminatory. In so holding, Alaska CLU concluded that the proper comparison in making such a determination was between same-sex and opposite-sex couples, regardless of marital status, and not between same-sex and opposite-sex unmarried couples.

Similarly, in Levin, the Court of Appeals of New York considered whether a housing

priority program at Yeshiva University was discriminatory based upon sexual orientation because it allowed non-students to cohabit with students in on-campus housing only if the non-students were the legal spouses of students. Because same-sex partners are prohibited from marrying in New York, the plaintiffs argued that the policy was discriminatory. Levin determined that the lower court's dismissal of the claims, which was based upon a comparison of homosexual and heterosexual unmarried couples, was in error. In her concurring opinion, Chief Judge Kaye noted "[t]he Appellate Division erred by holding that the appropriate comparison groups were unmarried heterosexual students versus unmarried homosexual students." Levin, 96 N.Y. 2d at 503 (emphasis omitted). The case was remanded to the New York Supreme Court to determine whether the "policy regarding university-owned housing with non-students disproportionately burden[s] lesbians and gay men . . ." Id. at 496.

The Court agrees with the analyses of the cases cited by the petitioners as to the appropriate groups for comparison. The Commission determined that the petitioners were similarly situated to unmarried, heterosexual employees and therefore had not been discriminated against based on their sexual orientation because unmarried, heterosexual employees also cannot receive benefits for their domestic partners. However, New Hampshire law prohibits marriage between persons of the same sex and does not otherwise provide a means for same-sex couples to legally sanction their committed relationship. See RSA 457:1, 457:2 (Supp. 2005). Thus, same-sex partners have no ability to ever qualify for the same employment benefits unmarried heterosexual couples may avail themselves of by deciding to legally commit to each other through marriage. For this reason, unmarried, heterosexual employees are not similarly situated to unmarried, gay and lesbian employees for purposes of receiving employee benefits. This analysis was employed by the Alaskan Supreme Court:

> [T]he proper comparison is between same-sex couples and opposite-sex couples, whether or not they are married. The [State] correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. These programs consequently treat same-sex couples differently from opposite-sex couples.

Alaska CLU, 122 P. 3d at 788. Based on the above, the Court concludes that the petitioners established a prima facie case of sexual orientation discrimination.

In response to the petitioners' claims of discrimination, the Stated argued, and the Commission found, that the Commission lacked the authority to override the administrative rules, the CBA, and RSA 21-I:30 (Supp. 2005), which specifically do not extend the benefits sought by the petitioners to lesbians and gay men. Essentially, the State's justification for its discriminatory policy is that the laws do not permit the extension of employment benefits like those sought by the petitioners, to same-sex couples.

The New Hampshire Administrative Rules state in relevant part:

> (a) The purpose of sick leave shall be to afford employees protection against lost income from absences due to illness or injury and, in particular, long-term disability due to catastrophic illness or injury, and shall not be used to supplement other paid time off.
> (b) An employee shall be entitled to utilize sick leave deducted from the employee's sick leave allowance for absences due to:
> (1) Illness;
> (2) Injury;
> (3) A request by the attending physician indicating that the employee's presence exposes another employee to contagious diseases which may endanger his or her health;
> (4) Medical and dental appointments with prior approval; or

(5) Death in the employee's immediate family.

(c) An employee shall be entitled to utilize up to 5 days of sick leave per fiscal year for the care of dependents residing in the employee's household.

(d) An employee shall be entitled to utilize up to 4 days of accumulated sick leave for a death in the employee's immediate family, which leave shall not be counted against bonus computations.

N.H. Admin. Rules, Per 1204.05 (emphasis added). The term "immediate family" is defined as a "designation used to administer bereavement leave. The term includes wife, husband, children, mother-in-law, father-in-law, parents, step-parents, step-children, step-brothers, step-sisters, grandparents, grandchildren, brothers, sisters, legal guardians, daughters-in-law, sons-in-law and foster children." N.H. Admin. Rules, Per 102.32. The term "care of dependents" is defined as, "sick leave used to care for a person residing in the employee's household who may be legally claimed as a dependent for tax purposes." N.H. Admin. Rules, Per 102.21.

The current CBA adopted by the legislature in August 2001 states in relevant part:

> Allowable Uses: An employee may utilize his/her sick leave allowance for . . . death in the employee's immediate family . . . An employee may utilize up to five (5) days of sick leave per fiscal year for the purpose of providing care to an ill or injured parent residing in the employee's household, dependent, child, or foster child, or to accompany such person(s) to healthcare provider visits. . . . Dependent shall be defined as a person residing in the employee's household who may legally be claimed as a dependent for tax purposes. CBA § 11.2
>
> Bereavement Leave: An employee may utilize up to four (4) days sick leave for a death in the employee's immediate family. . . . CBA §11.2.1
>
> Immediate Family: For the purpose of administering this provision, immediate family shall be defined as: wife, husband, children, mother-in-law, father-in-law, parents, step-parent, step-children, step-brother, step-sister, foster child, grandparents, grandchildren, brothers, sisters, legal guardian, daughter-in-law, and son-in-law. CBA § 11.2.2

Collective Bargaining Agreement § 11.2 (2001).

RSA 21-I:30 states in relevant part:

> I. The state shall pay a premium for each state employee and permanent temporary or permanent seasonal employee as defined in RSA 98-A:3 including spouse and

> minor, fully dependent children, if any, and each retired employee, as defined in paragraph II of this section, and his or her spouse, or retired employee's beneficiary, only if an option was taken at the time of retirement and the employee is not now living, toward group hospitalization, hospital medical care, surgical care and other medical benefits plan or a self-funded alternative within the limits of the funds appropriated at each legislative session and providing any change in plan or vendor is approved by the fiscal committee of the general court prior to its adoption. Funds appropriated for this purpose shall not be transferred or used for any other purpose.

(emphasis added).

The State argues that the petitioners have given an "overly literal and broad meaning to this State's anti-discrimination statute by taking it out of context and applying it in ways not contemplated by the legislature," and that this is evidenced by the administrative rules, the CBA and RSA 21-I:30 which all exclude same-sex domestic partners from receiving benefits. Resp. Memo. of Law in Support of Mot. to Uphold Findings of the Commission, Doc. 12, ¶ 11. Essentially, the State contends that because the CBA must be approved by the legislature, and because it was approved by the legislature without provision for same-sex domestic partner benefits, the legislature must not have intended RSA 354-A:7 to include the benefits sought by the petitioners. The Court disagrees.

RSA 273-A:3 (Supp. 2005) obligates the State to negotiate with its public employees through the collective bargaining process. RSA 273-A:9 (Supp. 2005) states that "[a]ll cost items and terms and conditions of employment affecting state employees" must be negotiated in that collective bargaining process. Under RSA 273-A:3, II (b) (Supp. 2005), all cost items must be ratified by the legislature. Nothing within these statutes, however, indicates that the State may negotiate, even with the approval of the SEA, a CBA that violates the anti-discrimination statute. Further, nothing within the statutes indicates that the State may, through its Division of Personnel, adopt administrative rules which violate the anti-discrimination statute. See Kimball v. New Hampshire Board of Accountancy, 118 N.H. 567, 568 (1978) ("Rules adopted by State

boards and agencies may not add to, detract from, or in any way modify statutory law."); see also Appeal of the State of New Hampshire, 138 N.H. 716, 722 (1994) (concluding that "unless the subject matter is otherwise reserved to the sole prerogative of the public employer by statute," the adoption of personnel rules does not exempt those rules from the negotiation process).

Moreover, ratification by the legislature of a CBA does not exempt the State from compliance with statutory law or automatically cause the CBA to supplant existing statutory law. The legislature's actions in approving the CBA do not translate into a determination of the legality of the terms of the CBA as it relates to sexual orientation discrimination. Although the legislative committee stated its wish not to extend benefits to domestic partners, commentary in the legislative history of the most recent CBA does not amount to a legislative overruling of a statute, nor does this allow either the State or the legislative committee to circumvent statutory law. In this case, RSA 354-A:7 is clear and unambiguous. "It shall be an unlawful discriminatory practice . . . [f]or an employer . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation." RSA 354-A:7 (emphasis added).

The Court similarly finds the State's argument that RSA 21-I:30 effectively prevents the State from extending health care benefits to same-sex partners to be unpersuasive. RSA 21-I:30 states that the State "shall pay a premium for each state employee and permanent temporary or permanent seasonal employee as defined in RSA 98-A:3 including spouse and minor, fully dependent children, if any . . . ."

"Th[e] Court is the final arbiter of the intent of the legislature as expressed in the words of a statute." In re Estate of Locke, 148 N.H. 754, 756 (2002). "When construing a statute's meaning,

[the Court] first examine[s] its language, and where possible, [ ] ascribe[s] the plain and ordinary meanings to words used." Id. Furthermore, "when examining statutory language, [the Court] construe[s] all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result." Id. "When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion." Board of Selectmen v. Planning Board, 118 N.H. 150, 152 (1978). "When interpreting two statutes which deal with a similar subject matter, [the Court] will construe them so that they do not contradict each other and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Petition of Public Serv. Co. of N.H., 130 N.H. 265, 282 (1988) (citation omitted). "It is elementary that the legislature should not be presumed to do an idle and meaningless act. . . ." Kalloch v. Board of Trustees, 116 N.H. 443, 445 (1976).

The State argues that RSA 21-I:30 prohibits granting health benefits to anyone other than state employees, their spouses and their minor, fully dependent children. However, the State ignores the term "including" which precedes the list of those individuals entitled to health care benefits under the statute. The term "including" indicates that the factors listed are not exhaustive. Conservation Law Foundation v. New Hampshire Wetlands Council, 150 N.H. 1, 5-6 (2003). "The term 'including' [however] limits the items intended to be covered by the rule to those of the same type as the items specifically listed." Id.

Where, as here, the 1997 amendments to RSA 354-A:7 specifically include a provision prohibiting sexual orientation discrimination in employment, and in the terms and conditions of that employment, it is apparent that use of the term "including" within the language of RSA 21-I:30 allows for the extension of benefits to more than an employee's spouse and minor children. To find

otherwise would be to negate the intent of the 1997 amendment or to find the two statutes contradictory. Additionally, in 1997, RSA 273-A:9 was amended to include the term "all" to cost items subject to collective bargaining. RSA 273-A:9 (Supp. 2005). This further bolsters the petitioners argument that health insurance benefits – as a cost item – are subject to collective bargaining and do not fall outside the scope of the bargaining process even in light of the provisions of RSA 21-I:30. Thus, the Court concludes that RSA 21-I:30 does not bar the inclusion of health benefits for same-sex partners from the CBA.

Finally, the Court disagrees with the Commission's determination that it lacked the authority to rule on the petitioners' claims because the petitioners are effectively attacking the constitutionality of the marriage laws. The petitioners have brought a valid statutory claim based upon employment discrimination and have expressly disavowed any constitutional challenge.

> Because the public employers' benefits programs could be amended to include unmarried same-sex domestic partners without offending the [marriage laws], th[ose laws] do[ ] not foreclose plaintiffs' . . . claims here. That the [marriage laws] effectively prevent[ ] same-sex couples from marrying does not automatically permit the government to treat them differently in other ways. It therefore does not preclude public employees with same-sex domestic partners from claiming that the spousal limitations in the benefits programs invidiously discriminate against them. . . . They argue not that they have a right to marry each other, but that the benefits programs discriminate against them by denying them benefits that the programs provide to others who . . . are similarly situated.

Alaska CLU, 122 P.3d at 786-87. Because the petitioners have established a prima facie case of sexual orientation, and because the State's justification for the discriminatory policy at issue is insufficient, the petitioners have met their burden under a disparate treatment analysis of establishing that the policy impermissibly discriminates on the basis of sexual orientation in violation of RSA 354-A:7. See Villanueva v. Wellsley College, 930 F.2d 124, 128 (1st Cir. 1991) ("There is no absolute rule that a discrimination plaintiff must adduce evidence in addition to that comprising the prima facie case and the rebuttal of defendant's justification in order to

prevail at either the summary judgment stage or at trial.").

Moreover, even if the petitioners had been unsuccessful in proving the policy to be facially discriminatory under a disparate treatment analysis, the petitioners have sufficiently demonstrated that the policy adversely effects gays and lesbians under a disparate impact analysis. The Commission did not address the petitioners' disparate impact claim in its initial report and issued the following statement in its order on complainant's request for reconsideration:

> Although not contained in the final Report, the Record demonstrates that the Investigator reviewed the adverse impact theory as an alternative theory. The law is clear that this theory requires a facially neutral policy. Such is not the case with the denial of benefits to the domestic partners – whether same or opposite-sex of Respondents' employees. Neither the marriage statute, the medical benefits policy, leave policy, the statute including sexual orientation in various anti-discrimination provisions, nor the Collective Bargaining Agreement and negotiations associated therewith, read alone or in concert, suggest anything other than a rejection by the Legislature of the extension of benefits to same-sex and opposite-sex partners.

Commission Order on Compl. Req. to Reopen and for Reconsideration, Ex. C, Doc. 14. The Commission's analysis is not clear, but the Court will alternatively assume that the State's policy is facially neutral and analyze it accordingly.

In Levin, Chief Judge Kaye wrote in her concurring opinion that ". . . the policy of providing partner housing to married students is facially neutral with respect to sexual orientation. That policy, however, has a disparate impact on homosexual students, because they cannot marry and thus cannot live with their partners in student housing. By contrast, heterosexual students have the option of marrying their life partners." Levin, 96 N.Y. 2d at 503 (emphasis omitted). This Court agrees.

Similar to the circumstances in Levin, the challenged employment policy here involves certain health and leave benefits which are conditioned upon the criterion of marriage. The

petitioners have demonstrated that lesbian and gay employees are adversely impacted because, unlike heterosexuals, they cannot meet the marriage requirement. The State's attempt to couch the issue as one wherein all unmarried individuals are impacted equally, avoids that reality. "[T]he [State's] attempt here is to extract married [couples] – the very group benefited by . . . the policy – from consideration in any disparate impact analysis thereby obscuring any realistic examination of the discriminatory effects of that policy." Levin, 96 N.Y. 2d at 496. Under a disparate impact analysis, which considers the "full composition of the class actually benefited under the challenged policy," it is apparent that the policy adversely impacts lesbians and gay men by using a criterion for eligibility which is predicated upon heterosexuality. Id. Because marriage is legal only between opposite-sex partners, and employment benefits for domestic partners are derived only through marriage, lesbians and gay men are disparately impacted in that they are effectively excluded from certain benefits of their employment. Thus, the Court concludes that the petitioners have established a prima facie case of discrimination under the disparate impact analysis.

The State's argument for justification of the policy, as noted in the above disparate treatment analysis, is insufficient to establish a legitimate nondiscriminatory purpose for the policy. As such, the Court finds the petitioners have established that the policy at issue impermissibly discriminates on the basis of sexual orientation in violation of RSA 354-A:7. Accordingly, for the foregoing reasons, the decision of the Commission is **REVERSED**.

Nothing in this order prohibits the State from adopting reasonable administrative rules to establish criteria by which to determine whether a same-sex couple is in the type of committed relationship intended to qualify for the employment benefits sought by the petitioners. Parenthetically, the Court can think of no such reasonable criteria which the petitioners in this

case would not meet.[1]

So **ORDERED**.

___May 3, 2006____
DATE

_____
Kathleen A. McGuire
Presiding Justice

[1] In 2000, the university system of New Hampshire negotiated domestic partner benefits through its collective bargaining agreement with the State. In order to qualify for same-sex domestic partner benefits under the university system of New Hampshire's collective bargaining agreement, the employee must attest that: 1) the partners are of the same gender; 2) the partners have been each other's sole partner for at least the last six months and plan to remain so indefinitely; 3) the partners are not legally married, and are not related by blood to a degree that would prohibit marriage, nor able to marry each other in New Hampshire; 4) the partners are at least eighteen years of age and mentally competent to consent to contract; and 5) the partners are responsible for each other's common welfare and financial obligations.